THE ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY

RESPONSES TO COMMENTS

CONSENT DECREE # CV 07-01989-PHX-SRB

A Consent Decree in **CV 07-01989-PHX-SRB** was lodged on July 30, 2009 ("2009 CD"). The 2009 CD is an update of a prior Consent Decree lodged on October 17, 2007 ("2007 CD"). The 2007 CD was never moved for entry by the Court; therefore these Responses to Comments will address both the comments received regarding the 2007 CD and the 2009 CD.

PARAGRAPHS 94(c) AND 96 OBJECTIONS - 2007/2009 COMMENTS[1]

ITT Corporation, Joray Corporation, D-Velco Corporation and Nelson Engineering Comments[2]

ITT Corporation ("ITT") and Joray Corporation ("Joray")[3] in 2007 and ITT, D-Velco Corporation ("D-Velco") and Nelson Engineering ("Nelson") in 2009 all made substantively similar comments concerning the respective CDs. ITT, Joray, D-Velco and Nelson object generally to the "cost recovery" reservation in paragraph 94(c) and contribution protection in paragraph 96 for Honeywell International, Inc. and Freescale Semiconductor, Inc. ("Working Party Settling Defendants" or "WPSD") and make the following comments and/or arguments:

1. The WPSD, allegedly responsible for the majority of the groundwater contamination in Operable Unit 2 ("OU2"), can now use paragraph 94(c) and Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") §107 to hold alleged *de minimus* parties liable for the entire cost of cleanup.
2. The WPSD will be able to sue other parties under CERCLA §107 and/or §113 and will be protected from counterclaims for contribution because paragraph 96 provides the WPSD CERCLA §113(f)(2) contribution protection.
3. An OU2 party which settles with the State and receives CERCLA §113

[1] The comments regarding paragraphs 94(c) and 96 are addressed here, separately from the remaining 2007 and 2009 comments.

[2] ITT's complete comments are at CV 07-01989, Docket #20 and #43. Joray's complete comments are attached hereto as Attachment A. D-Velco's complete comments are at CV 07-01989, Docket #39. Nelson's complete comments are at CV 07-01989, Docket #38.

[3] Joray has since settled its potential liability with WPSD and is a Non-Work Party Settling Defendant ("NWPSD") signatory to the 2009 CD.

contribution protection will still be vulnerable to a CERCLA §107 cost recovery claim brought by the WPSD.

4. The WPSD are not entitled to "cost recovery" under §107 of CERCLA. Current case law (specifically *United States v. Atlantic Research Corp.*, 551 U.S. 128 (2007)) holds that a potentially responsible party ("PRP") that has "voluntarily" incurred costs has a §107 cause of action against other PRPs. The WPSD have not voluntarily incurred costs, but instead, have incurred costs through a judicially approved settlement agreement with the State.

Arizona Department of Environmental Quality ("ADEQ") Response

The 2009 CD satisfies the criteria for approval by the Court because it is procedurally fair, substantively fair, reasonable and consistent with the objectives of CERCLA. The 2009 CD is procedurally fair because it was negotiated in an open process. The above Commenters, among others, were invited by the WPSD to settle potential liability as NWPSD. Despite the fact that WPSD have been implementing the OU2 remedy for eight years, no other party volunteered to assist or sought to be a party in the negotiation of the 2009 CD until the WPSD directly contacted other PRPs. It is substantively fair because the 2009 CD obligates the WPSD to pay 100% of the interim remedy. It is reasonable and in the public interest because it is consistent with the purposes of CERCLA and because the public will not bear the cost of both the actual and the anticipated costs of the interim remedy.

The 2009 CD cannot statutorily, but also does not, create new rights for the WPSD. Under the 2009 CD, WPSD commit to completing and fully funding the remedy that they have been conducting under Unilateral Administrative Order (UAO) from EPA and to reimbursing ADEQ for its costs. Paragraph 94 states that the parties reserve any right to contribution or cost recovery that they might already have and that the "Consent Decree is without prejudice" to those rights. A reservation of rights is not a grant of rights. Paragraph 94 does not create any rights the WPSD do not already have.

The Commenters' concern that the contribution protection of Paragraph 96 would lead to a result where the WPSD would recover all or a majority of their incurred costs from a *de minimis* or other party is not a basis for denial of the 2009 CD because a) there is no pending § 107 claim and therefore any decision on the issue would be advisory only; and b) it ignores the available defenses under CERCLA case law. A trial court would have to allow the WPSD to recover all of their response costs, whether incurred voluntarily or under government order, from others, notwithstanding their own contribution to the OU2 contamination. The Supreme Court in *Atlantic Research* stated (albeit in a discussion about §113 counterclaims) that "[a] district court applying traditional rules of equity would undoubtedly consider any prior settlement as part of the liability calculus." *Atlantic Research Corp.*, 551 U.S. at 141.

The Supreme Court in *Atlantic Research* held that a party that voluntarily incurs costs can recover those costs from another party pursuant to §107, but declined to address the issue of whether a party that has settled its liability with the State can pursue a §107 action against a non-settling party. *Id.* at 139.

The Supreme Court has also stated that joint and several liability is not mandated in every CERCLA cost recovery action, and that Congress intended the scope of liability to "be determined from traditional and evolving principles of common law[.]" *Burlington Northern and Santa Fe Ry. Co. v. U.S.*, 129 S. Ct. 1870, 1881 (2009) quoting *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983). The court in the *Chem-Dyne* decision (which Justice Stevens called the "seminal opinion on the subject of apportionment in CERCLA actions…" *Id*. at 1880) explained:

> A reading of the entire CERCLA legislative history in context reveals that the scope of liability and term joint and several liability were deleted to avoid a mandatory legislative standard applicable in all situations which might produce inequitable results in some cases…The deletion was not intended as a rejection of joint and several liability…Rather, the term was omitted in order to have the scope of liability determined under common law principles, where a court performing a case by case evaluation of the complex factual scenarios associated with multiple-generator waste sites will assess the propriety of applying joint and several liability on an individual basis.

572 F.Supp. at 808. The *Burlington* Court concluded that apportionment is proper when there is a reasonable basis for determining contribution of harm. *Id.* at 1881. The effect of the *Burlington* Court's decision is the clarification of the law that provides for divisibility of harm as a defense to claims seeking joint and several liability under §107.

Paragraph 123 of the 2009 CD states that a party that reaches a settlement with the WPSD will be added as a Non-Working Party Settling Defendant ("NWPSD") and will be entitled to all benefits of the 2009 CD, including the State's covenant not to sue and contribution protection. In the case of a settlement with ADEQ outside the 2009 CD, paragraph 94(c) states that if ADEQ enters into such a settlement with any other person or entity, the recovery is to be deposited to a dedicated account maintained by ADEQ for remedial work at the 52nd Street Site. Such recovery gives a settling party a defense in equity as it directly benefits the WPSD by reducing the costs they would otherwise subsequently incur. Furthermore, the contribution protection afforded the WPSD in the 2009 CD is only for "matters addressed in the Consent Decree." If the WPSD sue other parties pursuant to CERCLA §107 for costs incurred outside the scope of the 2009 CD, such parties can assert a CERCLA §113 defense to such an action.

It should be noted that there are several hypothetical assumptions in the Commenters'

objections. First, the WPSD will actually file a CERCLA §107 action against other parties. Second, the WPSD will attempt to recover the totality of or a disproportionate amount of their costs from those parties, notwithstanding documented evidence of significant releases of hazardous substances from their own facilities, and will enjoy a strong probability of success in that endeavor. Third, other parties will have no defenses whatsoever against a §107(a) action and as a result, risk judgment against them for a disproportionate share of costs. Finally, even if a party settles with the State, contributes costs, and receives CERCLA §113 contribution protection, the WPSD will readily perform an end-run around the settlement by suing the same party under §107(a).

None of these hypothetical "what-if" scenarios establishes a basis for denying entry of the 2009 CD under the judicial standards of review of a CERCLA consent decree, which is whether the 2009 CD is procedurally fair, substantively fair, reasonable and consistent with the objectives of CERCLA. Paragraph 94(c) does not create a cause of action for cost recovery. It simply reserves a claim for cost recovery. This reservation does not preclude any party from raising the very issues raised by the Commenters and are more appropriate in a judicial forum in which such a §107(a) action may be filed in the future.

2007 COMMENTS

ITT Corporation Comment #2

ITT notes that the language in paragraph M of section I should be modified by deleting "solely for the purpose of" before "Section 113(j)," arguing that "[e]ither the work is a response action or it is not. It cannot be a response action 'solely for the purpose' of obtaining the benefits in Section 113(j) of CERCLA."

ADEQ Response:

The language was modified accordingly for the 2009 CD.

ITT Corporation Comment #3 (2007 & 2009)

ITT complained that both the 2007 and 2009 CDs limit the WPSD to pursue only contribution claims against the State of Arizona and provide the State with protection from the WPSD for cost recovery actions, while not providing other parties the same protection.

ADEQ Response

This provision was the result of arm's-length negotiations between ADEQ, the WPSD and the NWPSD and does not result in any party not a signatory to the 2009 CD being in a lesser position than if ADEQ did not negotiate such a provision.

ITT Corporation Comment #4 (2007 and 2009)

ITT notes that the 2007 and 2009 CDs require the WPSD to inform the State at least 60 days prior to initiating a claim under §113, yet allows the WPSD to file suit under §107 without any notice to the State.

ADEQ Response:

The 2009 CD has been revised to add the requirement that the WPSD give ADEQ prior notice of the initiation of a CERCLA §107 cost recovery action.

Arizona Public Service Comment[4]

Arizona Public Service (APS) has reviewed the consent decree between the State of Arizona v. Honeywell International Inc. and Freescale Semiconductor, Inc., Case No. 2:07-cv-l0989-LOA (Consent Decree). The Consent Decree requires Honeywell International Inc. and Freescale Semiconductor, Inc. (Companies) to continue to extract and hydraulically contain the entire width and depth of contaminated groundwater in Operable Unit 2 (OU2) of the Motorola 52nd Street Superfund Site. APS is identified as a potentially responsible party in the Motorola 52nd Street Superfund Site, Operable Unit 3 (OU3), which is immediately down gradient of OU2. APS is working under an Administrative Order on Consent with the U.S. Environmental Protection Agency (EPA) to perform a Focused Remedial Investigation and Feasibility Study (RI/FS*)* at one of APS' facilities. EPA is conducting a groundwater RI/FS for all of OU3. APS is concerned about the performance of the OU2 extraction system, since it does not appear to be completely containing the contaminated groundwater in OU2.

APS' concerns about the Consent Decree are consistent with APS' comments on the OU2 Five Year Review Report that were submitted to the Arizona Department of Environmental Quality (ADEQ) in a letter dated January 5, 2007. In the January 5, 2007 letter, APS agreed and fully supported ADEQ's conclusion that the OU2 hydraulic containment system was not providing full capture, resulting in contaminated groundwater migrating from OU2 into OU3. To mitigate this condition and the complicating effect it will have on remedy selection in OU3, APS requested that ADEQ accelerate resolution of the identified deficiencies in the OU2 hydraulic containment system.

[4] APS' complete comments are attached hereto as Attachment B.

Although APS is not requesting any specific changes to the proposed Consent Decree, APS continues to advocate that the deficiencies in the OU2 hydraulic containment system be resolved expeditiously and prior to completion of EPA's OU3 groundwater RI/FS. APS understands that ADEQ will receive and review an annual OU2 Effectiveness Report from the Companies that documents the hydraulic performance of the OU2 capture system. If, during the annual review of this report, ADEQ decides that the OU2 containment system is not meeting the Groundwater Containment Performance Standard, the Companies are provided eleven (11) potential measures (Section 2.C. of the Statement of Work [SOW]) to perform, and in addition, may request a modification of the Groundwater Containment Performance Standard. APS is concerned that many of the eleven (11) measures, coupled with the provision that the performance standard can be modified, may not ensure full vertical and lateral capture thereby allowing contamination to continue to migrate into OU3 in perpetuity. APS encourages ADEQ to request that the Companies work expeditiously to fully characterize the southern extent of groundwater contamination in the OU2 area and, if necessary, implement remedial alternatives in order to meet the Consent Decree Groundwater Containment Performance Standard.

ADEQ Response:

ADEQ continually evaluates the effectiveness of the OU2 treatment system and makes recommendations to WPSD as appropriate. ADEQ receives an Annual Effectiveness Report and monthly operation and maintenance (O&M) Progress Reports to periodically determine the effectiveness of this interim remedy and has not found any substantial evidence to date that suggests loss of capture to the south; however ADEQ will continue to evaluate any changing conditions. Additionally, while not a part of this CD, ADEQ is working closely with Honeywell to quickly complete investigations of the southern extent of the solvent contamination and jet fuel contamination in the OU2 area. Based upon additional data collected in 2009/2010, additional remedial actions may be implemented if appropriate.

Salt River Project Comment ("SRP)[5]

SRP has reviewed the aforementioned Consent Decree. Based on that review, SRP requests that ADEQ and EPA re-evaluate and adjust the Applicable or Relevant and Appropriate Requirements (ARARs) identified for Operable Unit 2

In July 1994, ADEQ and EPA issued a Record of Decision (ROD) that identified groundwater extraction; groundwater treatment, and re-injection as the proposed remedy. The July 1994 ROD also identified all ARARs. While the ARARs specifically addressed groundwater re-injection, they did not consider the remedy that was actually

[5] SRP's complete comments are attached hereto as Attachment C.

implemented for OU2, i.e., discharge of treated groundwater to the Grand Canal, a surface water of the United States.

ADEQ and EPA should ensure that all substantive requirements for on-site or off-site discharges to surface waters are identified and complied with even though a permit incorporating that standard of control is not required.

The need for an updated ARAR evaluation was also discussed in a document titled *Second Five Year Review, Operable Unit* 2 *Motorola 52"d Street Superfund Site,* prepared by Arizona Department of Environmental Quality and LFR, Inc., September 25, 2006. This document suggests that the ARARs for OU2 are not very specific and that the State of Arizona Surface Water Quality Standards need to be considered (Table 4, page 182). SRP agrees with that recommendation.

ADEQ Response:

ADEQ has been working inter-divisionally and with the EPA to meet surface water quality standards associated with the OU2 chemicals of concern for the OU2 treatment system discharge. Furthermore, both agencies have been working cooperatively with the Companies to aggressively address any potential issues in a timely manner. Detailed re-evaluations of ARARs will occur during the next five-year review process of the OU2 treatment system, which is will begin in summer 2010.

The Lindon Park Neighborhood Association Comment #1[6]

The Lindon Park Neighborhood Association ("LPNA") respectfully submits the following comments on the above referenced Operable Unit 2 (OU2) Treatment System Consent Decree at the Motorola 52nd Street Superfund Site (M52). LPNA believes that discrepancies and deficiencies in the noticing process should result in an additional extension to the Public Comment Period.

Enclosed, you will find a summary of concerns noted in the noticing for the original public comment period and the extension.

As the Community Involvement lead for OU2 at M52, LPNA believes that ADEQ actions as related to its public noticing did not meet Federal Superfund community involvement goals to:

- Keep the community well informed of ongoing and planned activities
- Encourage and enable community members to get involved
- Listen carefully to what the community is saying
- Take the time needed to deal with community concerns. Change planned actions where community comments or concerns have merit, or

[6] LPNA's complete comments are attached hereto as Attachment D.

• Explain to the community what has been done and why (*bullet points from http://www.epa.gov/superfund/communitv/index.htm*)

Enclosed is a summary of concerns we had noted in the noticing for the original public comment period, many of which were related verbally to EPA before the extension was discussed, and additional concerns related to the noticing for the subsequent public comment period extension.

The responsibility and burden for community involvement should not rest with the community. Noticing for public notices should reach a wide and diverse population within the affected area and should be as easy to find and use as possible. Hurdles and impediments should be identified and all possible efforts exercised to remove them, but those efforts should not have to made by the community.

We believe that meeting the letter of the law, if this Public Notice process did, is not enough for community involvement at a federal superfund site. ADEQ, as the community involvement lead, should be striving to demonstrate its commitment to community involvement by also meeting the spirit of the law.

ADEQ Response

Comments noted.

LPNA Comment #2

At the November 6th, 2007 Motorola 52nd Street Superfund Site Community Advisory Group (CAG) meeting in response to a question to Arizona Department of Environmental Quality (ADEQ) from CAG members concerning what issues/activities over the next few months would be happening at the M52 Superfund Site that CAG members would want information about and want to discuss at a CAG meeting, ADEQ indicated nothing was going on and no CAG meeting would be necessary before May of 2008; CAG members refused to believe there would be nothing worthy of community discussion and participation and insisted on scheduling a CAG meeting in February. In response to CAG member concerns about the lack of substantive information presented at the November 6th CAG meeting ADEQ had the opportunity, and chose to pass it by, to focus awareness on the Consent Decree and the Public Comment period. This lack of adequate disclosure at the CAG meeting included no copies of the Public Notice or the Complaint and Consent Decree being available or copies provided to CAG members.

ADEQ Response

Notice requirements for the 2007 CD are prescribed by CERCLA § 9622(i) and Arizona Administrative Code (AAC) R18-1-401. ADEQ does not publish settlement agreements until **after** they have been lodged, and the 30-day public comment period started when the proposed Consent Decree was lodged with the Court.

LPNA Comment #3

Consent decree was not to be found at www.azdeq.gov until changes were made on the ADEQ website on November 13 although the November 8th, 2007, Public Notice states: "... or review the Consent Decree on the Web where it will be posted for 30 days at www.azdeq.gov."

ADEQ Response

Comment noted.

LPNA Comment #4

The December 10, 2007, Public Notice for the extension of the Public Comment Period included two links ("Consent Decree" in the title and "www.azdeq.gov" in the body, but both do not link to the OU2 Consent Decree; one does, one does not. Navigation from the ADEQ home page to the OU2 Consent Decree is too long and complicated for an average person to be able to reasonably find the document.

ADEQ Response

Comments regarding the ease of navigation and the timing of the availability of the document on the ADEQ webpage are noted. ADEQ continually works at improving the usability of the ADEQ website and includes a customer service feedback survey on the "Contact Us" page.

LPNA Comment #5

It should be made clear in the Public Notice or at least in naming the link (currently named "Motorola 52nd St. Complaint and Consent Decree") and the file ("m52consent.pdf") on the www.azdeq.gov website that the PDF file containing the Consent Decree ("m52consent.pdf") also includes the 1994 Interim OU2 ROD and the 1999 Explanation of Significant Differences to OU2 of the ROD (documents which are mentioned in the Public Notice but not easily or readily available to the public).

ADEQ Response

Comment noted.

LPNA Comment #6

Demographics of residents in the Motorola 52nd Street Superfund Site are entirely different from demographics of readership of the *Arizona Business Gazette* where the

Public Notice was published by ADEQ (please see Environmental Justice screening printout and ABG media kit attachments); the "Arizona Business Gazette delivers to a niche market of influential professionals in the Valley who are well-educated and among the most affluent everyday consumers. High level of attorney, small and corporate business leaders, real estate professionals and government officials" with 79% of readers top management decision makers (President, CEO, VP. GM, Owner/Partner, Attorney, Consultant) and 83% of readers having a college degree or higher.

We question whether the distribution area of the publication adequately includes the Superfund site area as it is mailed to subscribers in the Valley with the current issue available for purchase at "Barnes and Noble, Borders, AJ's Fine Foods and selected Fry's, Basha's, Albertsons and Safeway's throughout the Phoenix Metro area." We would encourage the notice be published in publications that are available at Food City and the Ranch Market and that have wide distribution throughout the Superfund Site area.

ADEQ Response

Proposed settlements of this type are customarily published in the Arizona Business Gazette, a periodical that many companies, agencies and municipalities use. Further, the Arizona Business Gazette meets the requirements for publication set forth in AAC R18-16-301.

LPNA Comment #7

The area around the OU2 site meets level 1 screening criteria for an Environmental Justice Area. A significant portion of the population is low income and non-English speaking. ADEQ and EPA print the M52 CAG meeting agendas in English and Spanish. As a Consent Decree associated with a Federal Superfund Site we believe the Public Notices should have been translated into Spanish and also noticed in a Spanish-language newspaper. If ADEQ is unable to do this, then arrangements with EPA to accomplish this additional noticing should be made.

ADEQ Response

Pursuant to the Arizona Constitution, Article 28, Section 4, official actions shall be conducted in English.

LPNA Comment #9

The public notice should be published in the *Arizona Republic* and a Spanish-language newspaper -newspapers which are widely distributed throughout the Motorola 52nd Street Superfund Site area and reach a varied demographic audience

ADEQ Response

See Response to 2007 LPNA Comment #6.

LPNA Comment #10

Having spent over one hour of my time in November conducting searches, I was still unable to find any record of the Public Notice through the www.ananews.com Public Records search. I then went to Burton Barr Library. When I mentioned that I was looking for a notice that appeared in the *Arizona Business Gazette* it was remarked that the manual (free) search on the Internet does not pull up many of the Business Gazette's Public Notices. I have had the same unsuccessful experience trying to find the December 10, 2007 Public Notice.

ADEQ Response

ADEQ does not have any control over such external internet content such as *www.ananews.com* (the website of the Arizona News Association) and the Burton Barr Library's internet search engines.

LPNA Comment #11

Due to the timing around the holidays the 30-day extension to the Public Comment period should have begun after the first of the year. This is necessary to allow for reasonable community awareness and participation. The decision to run the 30-day Public Comment Period through the holidays is a decision that severely and adversely affected the ability of the community and residents to participate. The Christmas -New Year period is a time when children are out from school, residents have significantly less free time, and many residents take trips.

ADEQ Response

The 2007 CD was filed in the middle of October with the public comment period to end in mid-November. Any impact on the "holidays" was a function of an unforeseen extension to the public comment period granted as a courtesy to the community.

LPNA Comment #12

ADEQ had to know about this at our CAG meeting which was held on November 6th. The public notices that were mailed out were postmarked November 7th. Instead of running the public notice in the Arizona Republic, where there would be some chance a few might see it the decision was made to advertise it by publishing it on November 8,

2007 in the Arizona Business Gazette, a newspaper not widely available or seen by many in the community At our December 6th meeting ADEQ made it clear they saw nothing happening at our site in the near future, not before probably May of 2008, that the CAG would want to meet on and discuss CAG members had to insist we go ahead and schedule a meeting for February. Since ADEQ knew about the OU2 Consent Decree and the public comment period, which ends December10th, this should have been disclosed at our CAG meeting. I know I would have wanted another meeting right away so we could have had a presentation on the contents of the document and a discussion of legal and technical implications.

ADEQ Response

See Response to LPNA Comments #2 and #6 above.

LPNA Comment #13

Although ADEQ extended the public comment period, no notification of this was made to CAG members outside the Public Notice mailing. Although ADEQ sends emails to CAG members prior to CAG meetings no effort was made to apprise CAG members of the original Public Notice nor its extension through e-mail and no suggestion was made for a presentation to discuss the Consent Decree at a CAG meeting. In fact the November 6, 2007 Agenda did not list the OU2 Consent Decree. ADEQ's presentation at the prior CAG meeting on August 23, 2007 listed the OU2 Consent Decree as under review in the OU2 Site Status Report, but the similar section of the November 6, 2007 presentation did not mention the OU2 Consent Decree as being completed.

ADEQ Response

See Response to LPNA Comment #2 above.

LPNA Comment #14

Hopefully, ADEQ will utilize all means available in publication of future Public Notices and consider use of e-mail notification as well as non-English language venues.

Addressing these concerns would begin to demonstrate that ADEQ, as the lead in community involvement at OU2, is capable of and willing to:

- Keep the community well informed of ongoing and planned activities
- Encourage and enable community members to get involved
- Listen carefully to what the community is saying
- Take the time needed to deal with community concerns

• Change planned actions where community comments or concerns have merit, or

• Explain to the community what has been done and why

ADEQ Response

Comments noted.

City of Phoenix Comments[7]

The City of Phoenix ("City") is concerned that the WPSD will sue the City under CERCLA § 107(a), thus circumventing the contribution protection awarded the City in a 1997 Consent Decree. The City seeks assurances that the WPSD will not pursue a § 107(a) claim against the City. Pursuit of such claims, argues the City, would deprive it of the benefit of its prior settlement.

ADEQ Response

In 1997, the City entered into a Consent Decree with the State of Arizona and Motorola, Inc. (predecessor to Freescale Semiconductor, Inc.) related to OU2 of the M52 Site for the City's role as the landlord of AlliedSignal, Inc. (predecessor to Honeywell International Inc.) *Consent Decree Between the State of Arizona and Defendants City of Phoenix and Motorola, Inc.*, CIV96-2625 (entered April 8, 1997). Pursuant to that 1997 Consent Decree, the City received protection from contribution claims. Specifically, Paragraph 70 of that 1997 Consent Decree expressly provides that the contribution protection awarded the City "shall apply to CERCLA claims by any person or entity under Section 107 or 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, and to non-CERCLA claims seeking, under other theories, substantially similar relief…"

Notwithstanding this expansive statement of its contribution protection in the 1997 Consent Decree, the City suggests in its comments that the 2007 CD should clarify the extent of the City's contribution protection. The City seeks assurances that WPSD will not attempt to circumvent the City's 1997 contribution protection by pursuing claims against the City under CERCLA § 107.

In response, ADEQ and WPSD agree that nothing in the 2009 CD or the judicial approval of it changes or diminishes in any way the scope of the contribution protection awarded the City in the 1997 Consent Decree.

2009 COMMENTS

[7] The City's complete comments are at CV 07-01989, Docket #19.

Salt River Project Comment #1[8]

SRP believes it is important to provide clarification regarding the current uses of water in the Grand Canal. The September 30, 1999 Explanation of Significant Differences to Operable Unit 2 Record of Decision states that the discharge of treated water to the Grand Canal will be used for agricultural irrigation (AgI) and agricultural livestock watering (AgL). While this is consistent with the designated uses of the Grand Canal under the Arizona Surface Water Quality Standards, in addition to AgI and AgL, Grand Canal water is used for urban irrigation and for aquifer recharge at two sites: the Avondale Wetlands and the New River Agua Fria Underground Storage Project (NAUSP).

ADEQ Response

The intention of the Explanation of Significant Differences (ESD) is for the OU2 discharge of treated water to be used for a beneficial re-use. At the time of the implementation of ESD, the agricultural end uses listed were the only ones available for the water from the Grand Canal. As the additional uses listed by SRP are still beneficial re-use, they are still acceptable and the overall intent of the ESD is still being met.

Salt River Project Comment #2

SRP entered into an agreement with Freescale Semi-conductor and Honeywell International, effective June 19, 2008, relating to the discharge of treated water from the Motorola 52nd Street OU2 treatment facility to the SRP Grand Canal. Pursuant to that agreement, SRP may shut off the OU2 discharge in the event of low demand conditions on the Grand Canal such that the treated water cannot be put to beneficial use. In addition, SRP may shut off the discharge if SRP determines that the discharge is causing or contributing to a Maximum Contaminant Level (MCL) exceedance in the canal downstream of the OU2 discharge. SRP recommends that the Statement of Work for the Operable Unit 2 Interim Remedial Action incorporate by reference and take into account the terms and conditions set forth in the June 19, 2008 agreement between SRP, Freescale and Honeywell.

ADEQ Response

The 2009 CD is an agreement between ADEQ, the WPSD and NWPSD. If there are other agreements that the WPSD and NWPSD have entered into outside of the 2009 CD, it is the responsibility of the WPSD and NWPSD to meet the terms and conditions of those agreements. Since ADEQ was not involved in the negotiation of any agreements between SRP and the WPSD and NWPSD, it is not appropriate to

[8] SRP's complete comments are at CV 07-01989, Docket #35.

incorporate a completely separate third-party agreement into the SOW for the 2009 CD. Furthermore, ADEQ feels the 2009 Consent Decree and SOW as currently written adequately address the possible scenarios SRP is posing. In Section XXI [Force Majeure] the 2009 CD does include provisions for conditions beyond the control of the WPSD and NWPSD such as low demand. Additionally, pursuant to Section 2.B of the SOW, the OU2 discharge must comply with the MCLs. Therefore, both the 2009 CD and the SOW include numerous provisions to enforce compliance. In the event of unanticipated non-compliance, both the 2009 CD and SOW include multiple provisions that encourage a return to compliance as soon as possible, which may include a temporary cessation of discharge. No additional references are necessary.

The Lindon Park Neighborhood Association Comment #1[9]

Due to severe budget cuts to the Arizona Department of Environmental Quality (ADEQ) Water Quality Assurance Fund (WQARF) program budget ($7 million funding in 2010 with the possibility of an additional 15% to 20% reduction compared to full program funding at $18 million), LPNA has a concern about whether adequate personnel and resources currently exist or will exist in the future at ADEQ to conduct the required level of oversight, planning, possible implementation of response actions and reporting required under the Consent Decree. The budget reductions have not been matched with any reduction in the number of state and federal sites requiring continuing clean-up efforts: 35 state Water Quality Assurance Fund (WQARF) sites, II federal Superfund sites, and 8 Department of Defense sites (sites listed at www.azdeq.gov/environ/waste/sps/siteinfo.html). The Lindon Park Neighborhood Association (LPNA) expressed concern over the Arizona state budget and "whether [ADEQ has] adequate personnel and resources" to appropriately execute the responsibilities of the 2009 CD.

ADEQ Response

While there have been cuts to the WQARF program, the progress of the site has not been hindered, and in some cases has increased over the last months. ADEQ sees no evidence to suggest progress will not continue at a pace at least as productive as the current rate. Additionally, the 2009 CD, in Section XXII "Reimbursement of Oversight Costs," requires the WPSD to reimburse ADEQ for its incurred oversight costs by depositing $75,000.00 up front to pay for oversight costs and replenishing funds if and when the account balance falls under $10,000.00.

LPNA Comment #2

[9] LPNA's complete comments are at CV 07-01989, Docket #41.

The M52 map from the ADEQ website differs from the M52 map in Appendix C of the Consent Decree in two significant ways: (1) the M52 map from Appendix C does not show the areas where there are insufficient data to draw the 2006 Contaminant Plume boundary line for volatile organic compounds in alluvial and bedrock groundwater that exceed the Aquifer Water quality Standards, and (2) the M52 map from Appendix C does not show the notch at 7th Avenue that belongs in the West Van Buren WQARF area. The Consent Decree map in Appendix C should be as current and accurate as possible and match information made available to the public by ADEQ.

ADEQ Response

ADEQ often creates new maps for new purposes. The purpose of the map created for Appendix C of the 2009 CD was merely to depict "generally" the location of the M52 site and the three operable units as described in Section IV "Definitions" of the 2009 CD. There was no intention to pose the Appendix C map as a detailed depiction of the most current technical information available. Furthermore, it should be noted that due to limitations in subsurface data, site maps of any kind are never **exact** representations of the extent of contamination.

LPNA Comment #3

Boundaries for the OU2 Treatment Facility need to be expanded to include the portion of the Salt River Project (SRP) Grand Canal where monitoring for the OU2 Boron Mixing Zone will occur. The Mixing Zone Work Plan is being developed and written, so it is not currently included in the Statement of Work (SOW), and will be added to the SOW after the effective date of the Consent Decree

ADEQ Response

In the Consent Decree "Treatment Facility" is defined as "the OU2 central groundwater treatment facility located at 12 North 20th Street, Phoenix, Arizona and its system components, consisting of groundwater extraction wells; conveyance piping from the extraction wells to the central groundwater treatment facility and from the central groundwater treatment facility to the point of discharge at the Salt River Project Grand Canal; and the monitor well network." The boron mixing zone is an area of the Grand Canal from the OU2 discharge point to a point 500 feet down stream. This is an area that will be subject to heightened monitoring to evaluate boron levels. However, there is no actual "treatment" to the discharged water for boron in the mixing zone or at the central groundwater treatment facility; therefore it is not appropriate to include an area of increased monitoring into the definition of the "treatment system."

LPNA Comment #4

In Paragraph 51, under "RETENTION OF RECORDS" the Consent Decree states that, "Each Work Party Settling Defendant shall preserve and retain for not less than 10 years after termination of this Consent Decree: (a) the final versions of documents in its possession or which come into its possession that are generated pursuant to the SOW, and (b) copies of all sampling data generated during the performance of the Work. Work Party Settling Defendants need not retain electronic copies of: (a) final versions of documents generated during performance of the Work that are printed in hard copy, or (b) e-mail. Each of the above record retention requirements shall apply regardless of any corporate retention policy to the contrary."

E-mails should be preserved and whenever applicable incorporated into the Administrative Record List. Electronic copies of all documents should be preserved since most, if not all, reports and data are generated and/or reported electronically using computer programs. Hard copies may not exist for everything that has been created and records should not be allowed to be lost through this oversight in the Records Retention Policy. ADEQ should routinely incorporate e-mails that directly deal with this site into the Administrative Record List.

ADEQ Response

The Administrative Record contains **final** documents that ADEQ used to rely on for decisions/policy. Decisions that are made through email communications are documented in final reports. Section XVIII "Retention of Records" is a requirement for the WPSD to memorialize final decisions, not the process that lead to those decisions.

LPNA Comment #5

Although LPNA had previously filed public comments detailing deficiencies in the Public Noticing procedure, ADEQ repeated many of the concerns. While the original Public Notice dated August 13,2009, stated that "PLEASE NOTE: Copies of the consent decree are also available at the site repositories, located at Saguaro and Burton Barr Libraries" copies were not available at either library days later and when an electronic copy was added at Saguaro Library no copy was still available at Burton Barr. After the Consent Decree was added to the ADEQ website, there were problems with a broken link in the Public Notice to the Consent Decree and neither library had copies of the earlier 2007 Consent Decree.

ADEQ Response

ADEQ staff provided electronic copies of the 2009 CD to the Burton Barr and Saguaro Libraries the day before the notice was published to ensure the documents would be available on the publication date. ADEQ staff did follow up with both of the library branches two (2) calendar days later and the electronic copies were available, however the Burton Barr library staff did have a difficult time locating the copies. ADEQ did not

receive any inquiries indicating there was a problem with the library copies therefore ADEQ was unaware of any further issues. ADEQ has since had a meeting with Burton Barr Library management to try and resolve these issues. However, ADEQ is not responsible for the oversight and training of library staff to ensure all documents are readily available for the public.

LPNA Comment #6

When an extension of the public comment period was announced (dated September 3, 2009) the earlier public notice was pulled from the ADEQ website (and a new file was given the same name as the older file). The earlier public notice should still have been available. There was information contained in the August 13, 2009 public notice that was not duplicated in the September 3, 2009 public notice. LPNA continues to question the appropriateness of using the *Arizona Business Gazette* for public noticing, which is detailed in the previous LPNA public comments dated January 8, 2009.

ADEQ Response

ADEQ removed the original notice from the ADEQ website so as not generate confusion regarding the dates of the extended public comment period. The extension notice was generated from the original notice, and a thorough review of both documents did not provide any information present in the original notice that was not also included in the extension notice.

LPNA Comment #7

The September 3, 2009 public notice states that "Comments must be postmarked by October 5, 2009" at the bottom and that "All written comments must be received by 5:00 p.m. on Monday, October 5, 2009" in the second paragraph. Due to its placement on a line by itself, the date at the bottom of the page is easily read while the earlier, contradictory deadline is buried within a paragraph and easily missed.

ADEQ Response

ADEQ agrees that the two comments “Comments must be postmarked by October 5, 2009” and “All written comment must be received by 5:00 p.m. on Monday, October 5, 2009” were contradictory and apologizes for the confusion. Any comments that were postmarked October 5, 2009 were accepted by ADEQ regardless of the date the Agency actually received the comments.

LPNA Comment #8

Although the September 3, 2009 public notice states that "A public meeting is scheduled

for September 17, 2009 at GateWay Community College, 108 N. 40th Street, MA 1100N, Phoenix starting at 6:30 p.m." the September 17, 2009 meeting actually focused on health risk assessment issues. The most minimal of presentations introducing the Consent Decree was made and only a single question was fielded and discussed. The Consent Decree was added to a previously scheduled meeting in response to a request from LPNA for a public meeting. LPNA would have liked to see a more thorough presentation and longer question and answer period, which would have necessitated a meeting dedicated to the Consent Decree. Why was that not possible?

ADEQ Response

ADEQ conducts regular open house style meetings regarding the M52 site. During 2009, meetings were held in February, July, September, and November. ADEQ uses extensive email and U.S. mail lists for invitees yet only a handful of people actually attend. Once ADEQ received a request for a public meeting to assist the public in forming comments on the 2009 CD, the public comment period was purposefully extended to include time after discussion at the September 17, 2009 open house meeting for members of the public to generate comments. The September meeting was already scheduled to discuss health risk assessment issues, however ADEQ was very clear that staff were prepared to spend as much time on the 2009 CD as the public wanted. Only one question was fielded and discussed by ADEQ because only one question was asked.

LPNA Comment #9

ADEQ had problems inserting the Consent Decree Public Notice into the ADEQ Calendar with both start and end dates appearing and being appropriate. The public has a right to expect a higher level of competence from ADEQ in its public noticing.

ADEQ Response

ADEQ provides website information as a courtesy to the general public and acknowledges the link the commenter refers to was inoperable for approximately two (2) calendar days at the beginning of the comment period and one (1) calendar day once the entire text of the document and appendices were uploaded to the ADEQ website and apologizes for the inconvenience. Once ADEQ was notified there was a problem with the link, it was repaired immediately and there were no subsequent problems for the remaining public comment period. ADEQ received no further complaints nor did ADEQ receive any complaints regarding the public comment period notice on the ADEQ website calendar.

LPNA Comment #10

Under the Consent Decree the United States Environmental Protection Agency (EPA)

should be notified in a timely manner of all developments at the OU2 Treatment Facility and all OU2 documents should be supplied to EPA for inclusion in the federal Administrative Record List.

Under "XIII. QUALITY ASSURANCE, SAMPLING AND DATA" where the requirement exists for Work Party Settling Defendants to "notify ADEQ not less than seven (7) days in advance of any sample collection activity ... unless shorter notice is agreed to by ADEQ," notification to EPA should occur at the same time.

ADEQ Response

ADEQ will timely notify EPA of all developments at the OU2 Treatment Facility and supply EPA with copies of all OU2 documents. EPA alone has the discretion to decide which documents are included in the federal Administrative Record List.

LPNA Comment #11

When questions are raised about sampling data in a data report a full validation is conducted using the raw data. Under Arizona Statutes certified laboratories are only required to keep raw data for five (5) years. Raw data should be available upon request for at least ten years and the contract with the certified laboratory should reflect this requirement. LPNA asks that the Court consider adding this requirement to the Consent Decree to insure no potential loss of verifiable data.

ADEQ Response

ADEQ has no information to justify why a lab should keep raw data longer than the statutory requirement. Compliance with current Arizona law is sufficient.

LPNA Comment #12

LPNA questions whether a mechanism should be incorporated into the Consent Decree to adjust the stipulated penalties upward based upon cost of living adjustments (COLAs) or some other formula, since stipulated penalties may not have increased since the inception of the Consent Decree.

ADEQ Response

ADEQ's Civil Penalty Policy (ADEQ Policy #0015.00) defines the parameters ADEQ will consider when developing stipulated penalties. At this time, cost of living adjustments are not part of the policy.

LPNA Comment #13

The Consent Decree defines "Operation & Maintenance" or "O&M" to "mean all

activities required to operate and maintain the Interim Remedial Action as required under the Operation and Maintenance Manual ('O&M Manual'), dated July 13, 2004, and approved by EPA and ADEQ on August 31, 2004." A question exists about whether all of the changes that have been made since approval of the " O&M" are recorded in the Administrative Record List and whether the changes are approved changes or may be "draft" changes as was raised at a September 8, 2009 LPNA Technical Assistance Grant meeting by Jenn McCall, M52 Remedial Project Manager for Freescale Semiconductor, Inc. LPNA asks the Court to require the applicable O&M Manual with the revised replacement pages be included as part of the Consent Decree and, if it is not already approved and a part of the Administrative Record List, that the " O& " with the original and the revised pages to preserve the history be included in the Administrative Record List.

ADEQ Response

The most current approved O&M Manual for the OU2 Treatment is the July 13, 2004 version, approved by EPA on August 31, 2004. Requirements of this CD include the updating of the O&M Manual.

LPNA Comment #14

LPNA requests clarification of the date of the O&M Manual. Volume I of the OU2 O&M Manual received by LPNA from EPA shows a date of January 24, 2002, which is the date in the ADEQ Administrative Record List for 12.1.3. A January 21, 2009, e-mail from Sherri L. Zendri, ADEQ Program Manager, indicates the attached Administrative Record List updated April 18, 2007 (CI 2009) is the index that "should be complete and current." In the Administrative Record List item 12.1.3 is the OU2 " O&M Manual, Volumes I -XIII, Prepared by CRA, *1/24/02,* (w/ revised replacement pages dated in upper right comer)." Are the July 13, 2004 and August 31, 2004 dates for the O&M Manual in the Consent Decree correct or is the ADEQ Administrative Record List date of January 24, 2002 correct?

If the referenced O&M Manual, contains unapproved "draft" changes that are not documented in the Administrative Record List then LPNA asks that the O&M Manual be required to be an appendix to the Consent Decree to document the language that is being referenced by the Consent Decree.

ADEQ Response

The most current O&M Manual for the OU2 Treatment is the July 13, 2004 version, approved by EPA on August 31, 2004. This document contains 13 volumes that are available to the public by request. ADEQ will provide the most current document in the Administrative Record and a copy of that document to the library repositories as soon as the document can be converted into a manageable format. O&M Manuals are

frequently updated as site conditions and equipment change; therefore it is inappropriate to include the O&M Manual as part of the 2009 CD and would also limit the WPSD ability to make effective updates to the O&M Manual.

LPNA Comment #15

The Standard Operating Procedures (SOPs) are continually being updated, are kept at the OU2 Treatment Facility and are not a part of the O&M Manual. LPNA asks that the Consent Decree reference the SOPs and incorporate them. In addition, due to advances in the ability to store and organize large quantities of data electronically, the SOPs should be captured, copies provided to ADEQ and EPA, and made a part of the Administrative Record List

ADEQ Response

The SOPs are a set of written instructions that detail the regularly recurring processes conducted for the O&M of the Treatment System. SOPs document the way specific activities are to be performed, and how individual pieces of equipment are to be operated and serviced so that all technicians perform these activities consistently. SOPs are specific to the equipment and activities necessary for that equipment. The SOPs are part of the O&M Manual and therefore will be a part of the Administrative Record. However, because the SOPs are very equipment specific and change depending upon equipment changes, it is inappropriate to include them as part of the 2009 CD.

LPNA Comment #16

LPNA requests an explanation of why language in the previous 2007 Consent Decree under "VII. PERFORMANCE OF THE WORK" that stated that, "The ADEQ Project Manager shall have the authority lawfully vested in a Remedial Project Manager ('RPM') and an On-Scene Coordinator ('OSC') by the National Contingency Plan" was removed in the current Consent Decree.

ADEQ Response

In consultation with EPA and the Arizona Attorney General’s Office, it was determined that this language was not appropriate and it was removed from the 2009 CD.

LPNA Comment #17

The ADEQ site description for the Motorola 52"d Street EPA NPL Site on its website, was last updated August 2009. The document states that "ADEQ has negotiated a consent decree with the companies for operation of the OU2 treatment system to takeover oversight from EPA. The public comment period for the consent decree ended

in December 2007. ADEQ is addressing objections to the consent decree." This document was updated after the July 30, 2009, ADEQ Press Release about filing of the current Consent Decree and the upcoming 30-day public comment period; however, ADEQ did not modify this section in the document.

ADEQ Response

Comment noted. ADEQ will revise the website information during the next round of updates.

LPNA Comment #18

When a specific request was made on to view copies of the Public Comments (and not ADEQ's responses to the Public Comments) submitted for the 2007 OU2 Consent Decree, I was initially informed by ADEQ that the previously submitted Public Comments were not public and copies were not available for viewing (see e-mail from Wendy Flood at 9:58 AM, October 2, 2009). Although the comments were subsequently e-mailed to me on Friday afternoon at 6:03 PM, I did not see or open the e-mail until I was at work on Monday morning, October 5, 2009 (I do not have Internet access at home). Additionally, the 2007 OU2 Consent Decree has not been available at either the Burton Barr Library or Saguaro Library. Both the previous Consent Decree and the Public Comments should be listed in the January 2009 ADEQ Administrative Record List and be available to the public.

ADEQ Response

The 2007 CD and any public comments received during the 2007 public comment period are public documents that are, and always have been, available from ADEQ upon a public records request. Public documents that are currently part of an ADEQ working file are still available for public review upon request. ADEQ makes every reasonable attempt to respond to public records requests in a timely fashion and a single day is not an unreasonable time frame for ADEQ to require for making documents available. Furthermore, since the LPNA request came to ADEQ the last business day prior to close of the comment period, ADEQ provided not just access to the documents, but copies for possession.

LPNA Comment #19

The public comments submitted in 2007 and January 2008 should have been made public immediately and added to the Administrative Record List no later than quarterly. If ADEQ is not capable of identifying public documents in a timely fashion and appropriately maintaining the Administrative Record List according to EPA guidelines, ADEQ should not be granted the lead at the OU2 Treatment Facility.

ADEQ Response

The 2009 CD stands by itself; it is neither an amendment nor addendum to the 2007 CD. It should be noted that the Administrative Record is a record of all final decisions leading to the final remedy at the M52 site. Since the 2009 CD is neither an addendum nor amendment to the 2007 CD, and since the 2007 CD was never moved for entry by the Court, the 2007 CD documents are not part of the Administrative Record.

LPNA Comment #20

LPNA asks that the 2007 OU2 Consent Decree documents and Public Comments be provided at the document repositories for access to the public and the public comment period for the current Consent Decree be re-noticed

ADEQ Response

Ample opportunity has been provided to the public for commenting on the 2009 CD and no further comment period will be extended.

LPNA Comment #21

Upon consideration of the concerns raised in these public comments LPNA requests that, unless all comments are adequately addressed, the Court find the Consent Decree to be inappropriate, improper, or inadequate and decline to enter the Consent Decree

ADEQ Response

The judicial standard of review of a CERCLA consent decree is whether the document is procedurally fair, substantively fair, reasonable and consistent with the objectives of CERCLA. The above issue does not demonstrate a deficiency within the document of this standard.